

112TH CONGRESS
2D SESSION

H. R. 3862

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 1, 2012

Mr. QUAYLE (for himself, Mr. COBLE, and Mr. ROSS of Florida) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Sunshine for Regu-
5 latory Decrees and Settlements Act of 2012”.

6 **SEC. 2. CONSENT DECREE AND SETTLEMENT REFORM.**

7 (a) APPLICATION.—The provisions of this section
8 apply in the case of—

1 (1) a consent decree or settlement agreement in
2 an action to compel agency action alleged to be un-
3 lawfully withheld or unreasonably delayed that per-
4 tains to a regulatory action that affects the rights of
5 private parties other than the plaintiff or the rights
6 of State or local governments—

7 (A) brought under chapter 7 of title 5,
8 United States Code; or

9 (B) brought under any other statute au-
10 thorizing such an action; and

11 (2) any other consent decree or settlement
12 agreement that requires agency action that pertains
13 to a regulatory action that affects the rights of pri-
14 vate parties other than the plaintiff or the rights of
15 State or local governments.

16 (b) IN GENERAL.—In the case of an action to be re-
17 solved by a consent decree or a settlement agreement de-
18 scribed in paragraph (1), the following shall apply:

19 (1) The complaint in the action, the consent de-
20 cree or settlement agreement, and any award of at-
21 torneys' fees or costs shall be published, including
22 electronically, in a readily accessible manner.

23 (2) Until the conclusion of an opportunity for
24 affected parties to intervene in the action, a party
25 may not file with the court a motion for a consent

1 decree or to dismiss the case pursuant to a settle-
2 ment agreement.

3 (3) In considering a motion to intervene by any
4 party that would be affected by the agency action in
5 dispute, the court shall presume, subject to rebuttal,
6 that the interests of that party would not be rep-
7 resented adequately by the current parties to the ac-
8 tion.

9 (4) If the court grants a motion to intervene in
10 the action, the court shall refer the action to its me-
11 diation program or a magistrate judge to facilitate
12 settlement discussions, which shall include the plain-
13 tiff, the defendant agency, and the intervenors.

14 (5) The defendant agency shall publish any pro-
15 posed consent decree or settlement agreement for
16 public comment before filing it with the court, allow-
17 ing comment on any issue related to the matters al-
18 leged in the complaint or addressed or affected by
19 the consent decree or settlement agreement.

20 (6) The defendant agency shall—

21 (A) respond to public comments received
22 under paragraph (5); and

23 (B) when moving that the court enter the
24 consent decree or for dismissal pursuant to the
25 settlement agreement—

- 1 (i) submit to the court a summary of
2 the public comments and agency responses;
3 (ii) certify the administrative record
4 of the notice and comment proceeding to
5 the court; and
6 (iii) make that record fully accessible
7 to the court.

8 (7) The court shall include in the judicial
9 record the administrative record certified by the
10 agency under paragraph (6).

11 (8) If the consent decree or settlement agree-
12 ment requires an agency action by a date certain,
13 the agency shall, when moving for entry of the con-
14 sent decree or dismissal based on the settlement
15 agreement—

16 (A) inform the court of any uncompleted
17 mandatory duties to take regulatory action that
18 the decree or agreement does not address;

19 (B) how the decree or agreement, if ap-
20 proved, would affect the discharge of those du-
21 ties; and

22 (C) why the decree's or agreement's effects
23 on the order in which the agency discharges its
24 mandatory duties is in the public interest.

1 (9) The court shall presume, subject to rebut-
2 tal, that it is proper to allow amicus participation by
3 any party who filed public comments on the consent
4 decree or settlement agreement during the court's
5 consideration of a motion to enter the decree or dis-
6 miss the case on the basis of the agreement.

7 (10) The court shall ensure that the proposed
8 consent decree or settlement agreement allow suffi-
9 cient time and procedure for the agency to comply
10 with chapter 5 of title 5, United States Code, and
11 other applicable statutes that govern rule making
12 and, unless contrary to the public interest, the provi-
13 sions of any executive orders that govern rule mak-
14 ing.

15 (11) The defendant agency may, at its discre-
16 tion, hold a public hearing on whether to enter into
17 the consent decree or settlement agreement. If such
18 a hearing is held, then, in accordance with para-
19 graph (6), a summary of the proceedings and certifi-
20 cation of the hearing record shall be provided to the
21 court, access to the hearing record shall be given to
22 the court, and the full hearing record shall be in-
23 cluded in the judicial record.

24 (12) The Attorney General, in cases litigated by
25 the Department of Justice, or the head of the de-

1 fendant Federal agency, in cases litigated independ-
2 ently by that agency, shall certify to the court his
3 or her approval of any proposed consent decree or
4 settlement agreement that contains any of the fol-
5 lowing terms—

6 (A) in the case of a consent decree, terms
7 that—

8 (i) convert into mandatory duties the
9 otherwise discretionary authorities of an
10 agency to propose, promulgate, revise or
11 amend regulations;

12 (ii) commit the agency to expend
13 funds that Congress has not appropriated
14 and that have not been budgeted for the
15 action in question, or commit an agency to
16 seek a particular appropriation or budget
17 authorization;

18 (iii) divest the agency of discretion
19 committed to it by Congress or the Con-
20 stitution, whether such discretionary power
21 was granted to respond to changing cir-
22 cumstances, to make policy or managerial
23 choices, or to protect the rights of third
24 parties; or

1 (iv) otherwise afford relief that the
2 court could not enter on its own authority
3 upon a final judgment in the litigation; or

4 (B) in the case of a settlement agreement,
5 terms that—

6 (i) interfere with the agency's author-
7 ity to revise, amend, or issue rules through
8 the procedures set forth in chapter 5 of
9 title 5, United States Code, or any other
10 statute or executive order prescribing rule
11 making procedures for rule makings that
12 are the subject of the settlement agree-
13 ment;

14 (ii) commit the agency to expend
15 funds that Congress has not appropriated
16 and that have not been budgeted for the
17 action in question; or

18 (iii) provide a remedy for the agency's
19 failure to comply with the terms of the set-
20 tlement agreement other than the revival
21 of the action resolved by the settlement
22 agreement, if the agreement commits the
23 agency to exercise its discretion in a par-
24 ticular way and such discretionary power
25 was committed to the agency by Congress

1 or the Constitution to respond to changing
2 circumstances, to make policy or manage-
3 rial choices, or to protect the rights of
4 third parties.

5 (c) ANNUAL REPORTS.—Each agency shall submit an
6 annual report to Congress on the number, identity, and
7 content of complaints, consent decrees and settlement
8 agreements described in paragraph (1) for that year, and
9 any awards of attorneys fees or costs in actions resolved
10 by such decrees or agreements.

11 **SEC. 3. MOTIONS TO MODIFY CONSENT DECREES.**

12 When a defendant agency moves the court to modify
13 a previously entered consent decree described under sec-
14 tion 2 and the basis of the motion is that the terms of
15 the decree are no longer fully in the public interest due
16 to the agency's obligations to fulfill other duties or due
17 to changed facts and circumstances, the court shall review
18 the motion and the consent decree de novo.

19 **SEC. 4. EFFECTIVE DATE.**

20 The provisions of this Act apply to any covered con-
21 sent decree or settlement agreement proposed to a court
22 after the date of enactment of this Act.

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